they were. There was a nexus between them and the pilot. They were both so it seems to me, engaged in the common work of enabling the ship to get underway. That the pilot was only a temporary member of the ship's company is immaterial because his employment was one of the common incidents of the voyage.

I have carefully examined the authorities to which our attention has been invited and I have come to the conclusion that the respondent was the servant of the appellants engaged in common employment with the crew of the "Mantetsu Maru" on a common work.

The respondent was not, in my opinion, employed under compulsion of law so as to destroy the contract of service between Master and Servant and the defence of common employment raised by the appellants therefore must succeed.

The appeal must be allowed.

Appeal allowed.

Solicitors for the appellants: *Rodyk & Davidson.*

Solicitors for the respondent: *Drew & Napier.*

YAP YOON LIN v. REGINA.

[A. Cr. J. (Spenser Wilkinson, J.) January 22, 1954]

[Penang — Criminal Appeal No. 39 of 1953]

Customs Ordinance, No. 42 of 1952, s. 131 — Charge of carrying uncustomed goods — Meaning of uncustomed goods.

In this case the accused was driving a car from Penang to Ipoh. At the Customs Examination Shed, Butterworth he was asked whether he had uncustomed goods to declare. The car was later brought to the Examination shed and there 96 dozens playing cards were found. The accused was convicted of being knowingly concerned in carrying uncustomed goods and the car in which the goods were being carried was ordered to be forfeited and from this conviction and order of forfeiture of the car he appealed.

Held: (1) the goods were not uncustomed goods as defined by the Ordinance and the appellant was therefore wrongly convicted of being knowingly concerned in carrying uncustomed goods; (2) on the facts the learned Magistrate could have convicted the appellant for failing to make a declaration of dutiable goods under section 129(1) paragraph (e) of the Customs Ordinance and the conviction should therefore be altered accordingly; (3) the order for forfeiture could not stand under the altered conviction under section 129(1) and therefore it was set aside.

Case referred to:—

(1) *Public Prosecutor v. Leong Yoon Meow* noted in (1953) M.L.J. xxxvi.

CRIMINAL APPEAL.

F. G. Pooley for appellant.

J. D. Peterkin, (Federal Counsel) for respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The appellant was charged jointly with one Vun Ah Sum in the Sessions Court as follows:—

"That you Yap Yoon Lin and Vun Ah Sum alias Voon Kee Sam on 7.10.53 at about 6.30 p.m. at the Customs Examination Shed, Butterworth, P.W. were knowingly concerned in conveying uncustomed goods, to wit, 96 dozens Caravan playing cards, with intent to defraud the Government of Customs duty thereon amounting to $460.80 and you have thereby committed an offence under section 131(1)(e) of the Customs Ordinance No. 42/52 and punishable under section 131 (1)(i) of the same Ordinance."

Upon this charge he was convicted and fined $3,000 and an order was also made confiscating the motor car in which the goods were carried.

The appellant had borrowed the motor car referred to from his uncle in order to go to Ipoh. On the 7th October, 1953 the appellant left Penang in his uncle's car in which, distributed between the back seat of the car and luggage boot, were some boxes containing tooth brushes and a number of packages containing playing cards and two pieces of mackintosh. In the car with the appellant was Vun Ah Sum the 2nd accused, who was acquitted in the Court below, and whose presence in the car is not material to this appeal. The appellant himself drove the car.

On arrival at the Customs barrier in Butterworth a Customs Officer, P.W. 2 asked the appellant if he had any dutiable goods. As a result of what then passed between P.W. 2 and the appellant the appellant got out of the car, took the two mackintoshes to the counter and paid duty on them amounting to $4. This is said to have taken him about ten minutes, and when the appellant returned to the car P.W. 2 asked him whether he had any other dutiable goods. In reply the appellant opened one of the packages of tooth brushes and asked if they were dutiable. He was told that they were not. By this time another ferry was approaching and as there were many packages in the car, the boot being full and the goods piled up to the level of the windows at the back of the car P.W. 2 directed the appellant to take the car to the Examination Shed for further inspection of the goods. There in reply to questions by other Customs Officers (P.W. 3 and P.W. 4) the appellant said he had "budak budak main main punya barang", which the Customs Officers, I think quite rightly, took to mean toys. Upon further inspection of the parcels in the car the Customs Officers in the Shed found the 96 dozens playing cards, the subject matter of the charge.

The appellant in a statement from the dock in the Court below stated that he had told P.W. 2 that he had in the car "main main punya barang". P.W. 2

denied this and the learned President found as a fact that the appellant used no such words in his conversation with P.W. 2. He further found that the actions of the appellant were more consistent than not with being fully aware that the playing cards were dutiable. His grounds of decision then continue as follows:—

"Therefore since the 1st accused knew or at the least must be deemed to have known that the playing cards were dutiable his failure to declare them until too late show that he had formed an intention to defraud the Government of the duty. He was therefore accordingly convicted of the charge."

Why the learned President inserted in this passage the words "or at the least must be deemed to have known" is not clear to me. Mr. Pooley on behalf of the appellant submitted that to "be deemed to have known" is not sufficient knowledge upon which to base a finding of intention to defraud. I think, however, that reading the grounds of decision as a whole it is clear that the learned President really found from the actions of the appellant in the circumstances of the case that he in fact knew that playing cards were dutiable, so that his failure to declare them to the Customs Officer, P.W. 2 at the barrier — and indeed his failure to declare them as such at all — showed his intention to defraud the Government of the duty. I am of opinion there was ample evidence before the learned President to support such a finding.

The real difficulties in this appeal arise not so much from the findings of fact as from the question of law raised in additional grounds of appeal which I allowed to be argued. The first point thus raised was whether there was any evidence that the goods were dutiable. This point is really relevant only in deciding whether the conviction can be altered to one under a different charge, and I do not think there is any substance in it. In my opinion, in a case of this kind, such evidence is not necessary. Playing cards are made dutiable by subsidiary legislation under the Customs Ordinance of which the Court must take judicial notice. The physical articles were produced in Court and were clearly playing cards. There may be cases in which it is necessary to adduce evidence that articles, the subject matter of proceedings, come within the description in the notification making articles of that description dutiable, but I do not think that this is such a case.

The next point is whether the goods were uncustomed goods as alleged in the charge. As pointed out by Mr. Pooley the Customs Ordinance, 1952 constitutes a substantial departure from the previous law in various respects. The equivalent in the Customs Enactment, 1936 of the present section 131(1)(e) was section 114(1)(f). The latter provision made it an offence to be knowingly concerned in conveying any prohibited or *dutiable* goods; whereas the present section 131(1)(e) makes it an offence to convey *uncustomed* or prohibited goods. Uncustomed goods are defined by the Ordinance as follows:—

"'Uncustomed goods' means goods in respect of which a breach of the provisions of this Ordinance or of any subsidiary legislation made thereunder has been committed."

Under this definition until an offence or breach of a regulation has been committed the goods are not uncustomed, and it is, therefore, argued on behalf of the appellant in the present case that as the goods did not become uncustomed until the offence charged was complete it follows that the appellant never conveyed uncustomed goods and should not have been convicted on this charge.

Against this it was contended on behalf of the Crown that by reason of section 99 of the Ordinance the failure of the appellant to declare the playing cards to P.W. 2 resulted in their being deemed to be uncustomed goods, so that the full offence charged has been made out.

Section 99(1) of the Ordinance reads as follows:—

"99. (1) Notwithstanding anything in this Ordinance contained, every passenger or other person arriving in or leaving the Federation shall declare all dutiable or prohibited goods in his possession, either on his person or in any baggage or in any vehicle, to the proper officer of customs, and if he fails so to do such goods shall be deemed to be uncustomed goods."

My first difficulty in regard to this argument put forward by the Crown is that the appellant has not been charged with failing to declare the goods. The section does not say that if a person fails to declare goods then the goods shall be deemed *to have been* uncustomed goods, and I do not think the words used can be read so as to apply retroactively. On general principles it appears to me that the appellant must be presumed to be innocent of the offence of failing to declare until he has been proved guilty of that offence and, if the prosecution were going to rely upon his being guilty of that offence, he should have been charged with it. It does not seem to me to be a course properly open to the prosecution to say: "We are charging you with conveying uncustomed goods and the goods are uncustomed because you committed another offence in respect thereof with which we are not charging you." Nor is it, I think, possible to say that a charge of conveying uncustomed goods implies an allegation that the accused either immediately before or at the same time committed some other offence, because if such implication were expressed in the main charge then I think it would be bad for duplicity; for in case of an acquittal the accused would not know if

he had been acquitted of failure to declare or of conveying uncustomed goods. The position might be different if somebody other than the appellant had committed an offence in respect of the goods; but that is not the case here.

I must admit that, in view of the definition of uncustomed goods, there seems to be no obvious purpose in the words "shall be deemed to be uncustomed goods" in section 99(1). If someone has failed to declare dutiable goods then clearly there has been a breach of the provisions of section 99(1), so that in the terms of the definition the goods in question are in fact uncustomed, without being deemed to be so. I find it difficult to escape the conclusion that the last words of section 99(1) are redundant. On the other hand I can see no particular connection between these words and the provisions of section 131. The offence of failing to declare is fully and specifically dealt with by paragraph (e) of section 129(1) and the punishment provided by that sub-section is greater, so far as imprisonment is concerned, than that provided under section 131. The Ordinance having thus provided for the case of failing to declare I do not think the presumption contained in the words in question is intended to have any bearing upon a charge under section 131(1). There may be circumstances which arise under other sections of the Ordinance in which the final words of section 99(1) would have effect or it may be that the words were inserted *ex abundanti cautela*.

A further suggestion was made in the course of the argument that the charge of conveying or being concerned in conveying uncustomed goods, once it has been made out, is itself the cause of the goods being uncustomed. This, however, seems to me to beg the very question which is before the Court on such a charge. I think the prosecution must, before conviction, as a part of their case prove that there was a conveying of the goods and that these goods were already uncustomed at the time they were conveyed. In other words the offence or breach which resulted in the goods being uncustomed must, I think, be prior in time to the conveying of the goods. The definition of uncustomed goods contained in the Ordinance must, if possible, be read into the sections where the expression occurs. We thus have in paragraph (e) of section 131(1) a provision which says in effect that whoever is knowingly concerned in conveying goods in respect of which an offence or breach of a regulation *has been* committed shall be guilty of an offence. I can find nothing in the context to suggest that behind these words there is anything but the simple idea that a person who conveys goods which he knows have already, before he conveys or is concerned with carrying them, been the subject matter of an offence or breach of a regulation commits the offence described in paragraph (e). To construe this paragraph otherwise would, I think, involve reading the definition as though it said "in respect of which an offence has been *or is being or is about to be* committed". This is not what the definition says. In other words I think the natural meaning of the words "knowingly concerned in conveying uncustomed goods" is "being knowingly concerned in conveying goods which one knows, at the time that they are conveyed, to be uncustomed" and not concerned in conveying goods which one knows will become uncustomed goods if they are conveyed". I would add that the presumption provided for by sub-section (2) of section 131 does not assist the prosecution until they have first proved that the goods were in fact uncustomed.

The third point raised was that the goods had not been conveyed. Mr. Peterkin for the Crown argued that goods are still being conveyed within the meaning of the section whilst they are in the car although the car is stationary and that in the present case they were still in the process of being conveyed after the appellant had failed to declare them. I would agree that if goods are being conveyed in a motor car, say from Penang to Ipoh, the fact that the car is from time to time stationary would not of itself interrupt the process of conveying the goods from place to place. In the present case, however, I feel that I must accept Mr. Pooley's contention that the conveyance of these particular goods came to an abrupt end at Butterworth when the goods came into the control of the Customs authorities. The only physical movement of the goods in question which took place after the appellant's conversation with P.W. 2 was the taking of the car from the Customs barrier to the Examination Shed. This movement, however, took place under the orders of the Customs authorities and cannot, I think, be said to be a conveying by the appellant. In any event, as I have already pointed out, the appellant was not charged with any prior offence which would have rendered the goods uncustomed nor was it suggested that anyone else had committed an offence in respect of these goods.

My conclusion is that on the facts of this case the appellant conveyed these goods from Penang to Butterworth but that at no time whilst they were being so conveyed were the goods uncustomed.

Having come to the conclusion that the goods in question in this case were not uncustomed at the time of the conveying which was charged it follows that the

facts found by the learned President do not support the charge as framed. The next question, therefore, is whether the conviction can be sustained upon some other charge and whether the circumstances are such that this Court ought to alter the conviction to one under some other section. It was suggested that paragraph (f) of section 131(1) substantially fits the facts of the present case. That paragraph reads as follows:—

"131. (1) Whoever —

(f) being a passenger or other person, is found to have in his baggage or upon his person or otherwise in his possession, after having denied that he has any dutiable or prohibited goods in his baggage or upon his person or otherwise in his possession any dutiable or prohibited goods;

shall be guilty of an offence....."

There is a difficulty in regard to section 131 in that there appears to be no provision for punishment in cases where the goods in question are neither uncustomed nor prohibited. I need not, however, go into this because upon the actual evidence given it does not appear to me to have been proved beyond a reasonable doubt that the appellant actually denied that he had no dutiable goods. Failure to declare is different from denial, and upon the evidence now on the record I would not feel justified in altering the conviction in this case to one under paragraph (f) of section 131(1).

I think, however, that there is no doubt upon the evidence on the record that the appellant committed an offence under paragraph (e) of section 129(1), which reads as follows:—

"129. (1) Whoever —

(e) being required by this Ordinance to make a declaration of dutiable goods imported or exported, fails to make such declaration as required;

The provisions of section 99(1) which clearly required the appellant to make a declaration have already been set out above. It appears to me that the question whether or not the appellant made a declaration of these playing cards was fully canvassed at the trial. Indeed, paraphrasing the words of Thomson, J. in *Public Prosecutor v. Leong Yoon Meow*[1] (Ipoh Criminal Revision 17 of 1953, unreported) what the appellant was alleged to have done could be described very easily in the language of the provisions of paragraph (e) of section 129(1) and in my view this was the section under which he should more appropriately have been charged. It was, in my opinion, open to the learned President at the conclusion of the hearing on the evidence adduced to convict the appellant under this paragraph. It is, therefore, in my opinion, open to me to alter the conviction to one under section 129(1)(e), and I, therefore, do so.

The sentence of a fine of $3,000 imposed by the learned President is one which was competent under section 129(1)(e), and I see no reason to alter it; but I think there is no doubt that in the circumstances of this case a conviction under the latter section has not the result of enabling the Court to order forfeiture of the motor car. I think the learned President was correct in deciding, upon a conviction for conveying, that the motor car had been used in the commission of that offence within the meaning of section 123 of the Ordinance, but it cannot be said that the motor car was used in the commission of the offence of failing to declare dutiable goods. It follows, therefore, that the order for forfeiture cannot stand and must be set aside.

When I reserved judgment in this case it was agreed by both sides that argument on the question of forfeiture would be heard at a later stage, if such argument became necessary. As a result of my decision on the other points such argument is not necessary and the order for forfeiture is set aside solely on the ground that it cannot stand under the altered conviction under section 129(1).

Subject to this, the appeal is dismissed.

Order accordingly.

Solicitors for the appellant: *Presgrave & Matthews.*